NOBLE SUCCESS SDN BHD

v.

KIYOTAKE HARA & ANOR

HIGH COURT MALAYA, SHAH ALAM
ABDUL WAHAB PATAIL J
[ORIGINATING SUMMONS NO: 24-32-97]
10 APRIL 1998

CIVIL PROCEDURE: *Contempt of court - Order of commital, application for - Whether leave necessary for such application*

CIVIL PROCEDURE: *Contempt of court - Order of commital, application for - Rules of the High Court 1980, O. 52 r. 2 - Whether fulfilled - Effect of non-compliance - Prejudice*

The applicant had by an *ex parte* notice of motion sought leave to commence committal proceedings against the first respondent. The grounds for the application were stated in the affidavit of a director of the applicant company. A statement under O. 52 r. 2 of the Rules of The High Court 1980 ('the RHC') was filed and leave was granted after the application was heard. At the hearing for the order of committal, the respondents raised the following preliminary objections: (i) that an application for committal can only be made after leave has been obtained; (ii) that there was no description of the applicant set out in the application as is required under O. 52 r. 2(2) of the RHC; (iii) that the grounds for the application were not set out in the statement as required under O. 52 r. 2(1) of the RHC; (iv) that there was no description of the person to be committed; and (v) that was no verifying affidavit in respect of the statement. It was argued that as the applicant had not complied with O. 52 of the RHC, the application for leave was bad.

Held:

[1] Order 52 r. 2(1) of the RHC provides that no application for an order of committal against any person may be made unless leave to make such an application has been granted. In this case the objection that the application for committal should only be made after leave had been granted was unfounded in fact, as the application for leave was filed on 12 June 1997 and heard on 29 August 1997 when leave was granted.

[2] Although the respondent had raised objections on non-compliance with O. 52 of the RHC, he had not shown in what manner he had been prejudiced, or that he was denied any protection provided under O. 52 of the RHC. The objections were thus merely technical.

[3] With regard to the objection that there was no verifying affidavit in respect of the statement, as required under O. 52 r. 2(2) of the RHC, there could be no doubt as to the purpose of the affidavit of the director of the applicant company, which was filed together with the application for leave. There were no other affidavits of the director that were filed that could give rise to confusion that would affect the decision of the court in granting leave or otherwise.

[4] An order of the court must be obeyed according to its terms unless there is an order to stay such order pending appeal, or there is an order setting it aside. Such orders may only be made by way of specific application.

[5] From the time the application for leave was made, there was no specific application made to have the grant of leave set aside. Although there was a notice of objection filed, this notice was not itself an application to set aside the grant of leave and could not be treated as such. The respondent having had the time and opportunity to make an application to set aside the leave, clearly had not done so. That leave not having been challenged directly by an application to set it aside, the respondent could not indirectly attack the grant of leave by way of preliminary objection.

[Preliminary objections dismissed.]

Cases referred to:

Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors [1986] 2 CLJ 109 ***(foll)***

Chandra Sri Ram v. Murray Hiebert [1997] 3 CLJ Supp 518 ***(refd)***

Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd & Anor & Another Appeal [1996] 1 CLJ 141 SC ***(refd)***

Nicholls v. Nicholls (The Times 21 January 1997) ***(refd)***

Sykt M Mohamed v. Mahindapal Singh & Ors [1991] 2 MLJ 112 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 52 rr. 2, 3

For the plaintiff - M Menon (Alen Miranda with him); M/s Jaafar & Menon
For the defendant - R Sodhi (V Megendra with him); M/s N Saraswathy Devi

Reported by Michele Saw

JUDGMENT

Abdul Wahab Patail J:

The Background

By an *ex parte* notice of motion filed on 12 June 1997 (encl. 13), the applicant, Noble Success Sdn Bhd, sought leave to commence committal proceedings against the respondent, Kiyotake Hara. The grounds for the application were as stated in the affidavit of a director of the applicant company. A statement under O. 52 r. 2 of the Rules of the High Court 1980 was filed on 12 June 1997 (encl. 14). The application for leave was heard on 29 August 1997 when leave was granted.

An originating summons seeking an order of committal against the respondent was filed on 9 September 1997 (encl. 15). It was fixed for hearing on 18 November 1997. Counsel for respondent filed a notice of preliminary objection on 17 November 1997.

On 25 November 1997, a summons in chambers (encl. 26) was filed by the above applicant to amend the "*ex parte* notice of motion" (encl. 13) to read "*ex parte* summons in chambers", and the "originating summons" (encl. 15) to read "notice of motion". This summons in chambers was heard on 23 December 1997 before the Senior Assistant Registrar, who rejected the application. The applicant appealed (encl. 29) to the judge in chambers. On 8 January 1998, the appeal was allowed. These latter two hearings were defended by counsel. Indeed counsel for the respondent had appeared since 18 November 1997, having filed notice of appointment of counsel on 13 November 1997. Counsel filed an affidavit as counsel on 9 December 1997. However a notice of change of counsel was filed on 22 January 1998.

This Application

The notice of motion for committal heard today then was originally filed on 24 October 1997 (encl. 15) as an originating summons, amended as a per the order of 8 January 1998 and re-filed on 14 January 1998 (encl. 31), for an order for committal, costs and such other orders as the court thinks fit.

The Preliminary Objections

The following preliminary objections were raised by counsel for the respondent:

1. An application for committal may only be made after leave has been granted.
2. The description of the applicant as required by O. 52 r. 2(2) was not set out in the application.
3. The grounds for the application was not set out in the statement under O. 52 r. 2(1).
4. Similar to 1 above, there was no description of the person to be committed.
5. There is no verifying affidavit in respect of the statement.

Order 52 provides as follows:

> **Rule 2. (1)** No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.
>
> **Rule 2. (2)** An application for such leave must be made *ex parte* to the Court, except in vacation when it may be made to a Judge in Chambers, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

The First Objection

The objection that an application for committal may only be made after leave has been granted is unfounded in fact because the application for leave was filed on 12 June 1997 and heard on 29 August 1997 when leave was granted. The application for committal by way of an originating summons was filed on 9 September 1997 and subsequently amended to a notice of motion on 8 January 1998.

The Second, Third And Fourth Objections

I turn now to the second, third and fourth objections which relates to the failure to state the description of both the applicant as well as the respondent, and the grounds of committal, in the statement (encl. 14) required under O. 52.

The statement contained, in respect of the applicant, only its company name and its address. No description was provided. In respect of the respondent, only the name and address was given. There was no description. The grounds for the application that is required by r. 2(2) as given the statement is as follows:

> Sila rujuk kepada AFIDAVIT MOHD AYUB BIN HASSAN yang difailkan bersama.

The statement was filed on 12 June 1997, on the same day and time as the "*ex parte* notice of motion" for leave (encl. 13), subsequently amended to "*ex parte* summons in chambers" was filed, together with an affidavit of Mohd Ayub bin Hassan affirmed on 12 June 1997 (encl. 12). The last paragraph of the application for leave stated as follows:

> Alasan-alasan menyokong permohonan ini adalah seperti yang dinyatakan dalam Afidavit Mohd. Ayub bin Hassan yang diikrarkan pada 12 Jun 1997 dan adalah dengan selanjutnya disokong oleh Pernyataan selaras dengan ATURAN 52 KAEDAH 2 (2) KAEDAH-KAEDAH MAHKAMAH TINGGI, 1980 dan kesemua dokumen-dokumen sokongan adalah difailkan bersama permohonan ini.

What the applicant has done was to put the grounds in one single document: the affidavit of Mohd Ayub bin Hassan. Ordinarily the grounds would have to be stated in the originating summons as well as the statement under O. 52.

Now to the applicant's reply.

As to the second and fourth objections it was argued by the applicant that the non-compliance was mere technicality, since description of the applicant would merely be the general description that the applicant is a company registered under the laws of Malaysia. The failure to describe the respondent was also argued to be mere technicality since there is no doubt that he is the respondent, Kiyotake Hara.

The third objection relates to the failure to set out the grounds in the statement under O. 52 filed on 12 June 1997. However, the statement under O. 52 and the affidavit verifying the facts relied on are filed together with the application for leave. The facts relied on would be initially set out in the grounds for the committal in the statement. While it may be a logical conundrum to verify something which itself states the facts are as stated in the verifying document, there is no practical objection. It may well be that the grounds set out in the statement will be brief and to the point, while the affidavit verifying the facts

relied on is longer; but it matters not whether the material required is in one document or the other, especially when the facts are in fact set out in the affidavit duly affirmed rather than in an un-affirmed statement. It is mere technicality that the facts relied upon are set out in the affidavit rather than in the statement under O. 52 since both documents are there together.

It was submitted that in view of the defects in the statement under O. 52 as set out in the second, third, fourth and fifth objections, the application was defective. In support of this argument, counsel cited *Syarikat M Mohamed v. Mahindapal Singh & Ors* [1991] 2 MLJ 112, where it was held that since committal proceedings are quasi-criminal proceedings and the liberty of the subject is involved, the procedural rules applicable must be strictly enforced. The applicant not having complied with O. 52, it was submitted, the application for leave was bad.

The applicant submitted that the Supreme Court in *Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193 dealt with procedural objections that the motion for committal under O. 52 did not state that it had been issued pursuant to leave granted, there was no statement under O. 52 before the court when leave was granted, that the original documents in the *ex parte* application including the affidavit in support were not served, and that leave had lapsed under O. 52 r. 3(2). It was held that there is a distinction in principle between cases where there has been non-observance of some safeguards laid down under O. 52, Rules of the High Court in the interest of the alleged contemnor and a mere technical irregularity. Whilst the former is fatal, the latter is not.

Superficially *Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors* seems to support the applicant. However, the reason given for the rejection of the first objection was that motion could not have been issued without leave. Thus failure to mention it in the motion for committal was mere technical irregularity. Furthermore it was held, the extracted order granting leave was subsequently served well before the date of the filing of the application for committal. The objection that no statement was before the court when leave was granted was in fact unfounded, and the court held that in relation to the fourth objection, the term "entered for hearing" also included in its meaning the filing of the notice of motion.

It was inherent in the reasoning in *Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors* that the motion for committal could not have been issued without leave, and that the order granting leave was served well before the filing of the motion for committal. In other words, the technical irregularity that was accepted was mere failure to so state in the motion when in fact the requirements of O. 52 was in fact complied with; that would be the strict ratio

of the case. While *Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors* does not appear to have been cited to the court in *Syarikat M Mohamed v. Mahindapal Singh & Ors*, the latter case is consistent in substance with the former. But the dicta in *Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors* that there is a distinction in principle between cases where there has been non-observance of some safeguards laid down under O. 52, Rules of the High Court in the interest of the alleged contemnor and a mere technical irregularity, is in my view highly persuasive. In *Nicholls v. Nicholls* [The Times 21 January 1997], it was held that while the procedural requirements in relation to applications to commit and committal orders are there to be obeyed and to protect the contemnor, if there is non-compliance with the requirements which does not prejudice the contemnor, to set aside the order purely on the grounds of technicality is contrary to the interest of justice. The High Court in *Chandra Sri Ram v. Murray Hiebert* [1997] 3 CLJ Supp 518 adopted this view in holding in that case that even assuming for a moment that there was procedural irregularity, such irregularity did not affect the validity of the *ex parte* application or the substantive notice of motion. With respect I agree.

The purpose of the statement under O. 52 is to ensure for the grounds of the committal, the applicant and the person to be committed are clearly identified and stated, upon which the court could then decide whether to grant leave. That application, it must be noted, is an *ex parte* application.

While I think it can be fairly said that on the face of the statement under O. 52 as filed, we see that the applicant is Noble Success Sdn Bhd, but whether a company or not and if a company whether registered in Malaysia or not we do not know, and the respondent is one Kiyotake Hara, but whether he is the same Kiyotake Hara we again do not know, and therefore *prima facie* order 52 had not been complied with, I cannot say the court was during the *ex parte* application unclear, who the applicant and the respondent were. The application itself is made in the same file as the original action.

After leave has been granted, and the applicant files the motion for committal within the time limited under O. 52 r. 3(2), he must under r. 3(3) thereof serve upon the respondent that notice of motion, accompanied by the statement and the affidavit in support of the application for leave. I would note that O. 52 r. 3(2), while providing that the notice of motion for committal, accompanied by a copy of the statement and affidavit in support of the application for leave must be served personally unless excepted under r. 3(4), there was no requirement that the order granting leave or the application for leave itself be served.

In my view, as O. 52 rr. 2 and 3 are drafted, it is not intended that its compliance are to be the basis of sustainable objections, unless it can be shown that the order itself had been ignored in substance rather than in form and the non-compliance had prejudiced the respondent. There would be more substance in the respondents' objections if it is shown that the grounds in the motion for committal differs or contradicts the grounds or identities given in the application for leave, whether in that application itself, the statement or the affidavit verifying the facts relied upon.

While the respondent has raised these objections on non-compliance with O. 52, the respondent has not shown in this case in what manner he has been prejudiced in his defence, or denied any protection provided under O. 52. The objections then are mere technical objections. They fall well within the principle enunciated in *Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors.*

I would therefore reject objections two, three and four.

The fifth objection asserts there is no verifying affidavit in respect of the statement.

Order 52 r. 2(2) provides that the application for leave must be supported by two documents: firstly the statement and secondly an affidavit verifying the facts relied on. The affidavit of Mohd Ayub bin Hassan affirmed on 12 June 1997 (encl. 12) was filed together with the application for leave. While it may not have contained the title "Affidavit verifying facts relied upon under O. 52 r. 2(2)", there is no doubt as to the purpose of the affidavit of Mohd Ayub bin Hassan affirmed on 12 June 1997 filed together with the application for leave. There is no assertion that there were other affidavits affirmed by Mohd Ayub bin Hassan on that day such as to give rise to confusion that would affect decision of the court in granting leave or otherwise.

I would dismiss the fifth objection.

The Collateral Attack

I turn next to the objection by the applicant that these preliminary objections are a collateral attack and should not be allowed. Counsel cited *Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd & Anor & Another Appeal* [1995] 3 MLJ 472 SC in support, where it was held that an order for substituted service of the High Court must be obeyed save in a few exceptions and its validity can only be challenged by proceedings instituted for the very purpose and cannot be challenged collaterally in other proceedings. In this case no application had been made to set aside the *ex parte* application for leave or the order for leave.

Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd & Anor & Another Appeal dealt with two appeals. The first appeal was in respect of an application to set aside a default judgment and for an order that the appellant be given leave to file an appearance and statement of defense to the plaintiff's claim. In the affidavit it was deposed, with regard to the default judgment, that it was erroneous for allowing interest of 18% when 8% was claimed, and when the respondent/plaintiff was allowed cost on solicitor and client basis. The High Court hearing the application, instead, set aside the order for substituted service subsequent to which the judgment in default was obtained, it being shown on affidavits that the service was bad although the isuue was not pleaded. The Supreme Court held that the learned trial judge erred in setting aside the order for substituted service when that order itself was not challenged, since what was challenged was for quite different reasons.

The second appeal dealt with an application, after filing conditional appearance, to set aside the service on the grounds that the order for substituted service was bad in law. The Supreme Court agreed that the order was bad in law, but disallowed the objection on the grounds that the applicant in having applied for an order for delivery of a statement of claim, had treated the action as a properly constituted action. He had waived the right of objection. A person cannot approbate and reprobate at the same time. In simple terms, even if the challenge to the leave granted is made by a specific application, it may not necessarily be allowed automatically.

Indeed it is trite law that an order of a court must be obeyed according to its terms unless there is an order to stay such order pending appeal, or there is an order setting it aside. Such orders may only be made by way of specific application.

The respondent had been represented by counsel 27 February 1997, and had changed counsel in November 1997. When current counsel first appeared on the application for committal (encl. 15) on 18 November 1997, counsel had only applied for postponement. On the application for amendment (encl. 26) on 4 December 1997, counsel applied for postponement, which was then heard by the Senior Assistant Registrar on 22 December 1997. On 8 January 1997 when the applicant applied for a hearing date of this application, the respondent had requested a date in February. In all this time, no specific application was made to have the grant of leave set aside. The notice of objection filed on 17 November 1997 is not itself an application to set aside the grant of leave, and may not be treated as such.

The respondent having had the time and opportunity to make an application to set aside the leave, clearly had not done so. That leave not having been challenged directly by an application to set it aside, the respondent cannot indirectly attack the grant of leave by way of this preliminary objection.

I dismiss the preliminary objections, and proceed to hear the notice of motion for committal.